

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

60205

FILE: B-183535

DATE: November 24, 1975

MATTER OF: Service Industries, Inc.;
Merchants Building Maintenance Company

97692

DIGEST:

1. While termination of contract for convenience of Government is matter of administrative discretion not reviewable by GAO, review of procedures leading to award of contract is within GAO jurisdiction.
2. Where small business size status protest was timely filed with contracting officer within 5 days after notification of successful offeror, but after award, SBA determination that protested offeror was not small at time of award does not result in contract awarded being void ab initio, but merely void at option of Government, thereby precluding effective size protest. To remedy this anomaly, it is recommended that FPR be revised to require that identity of successful offeror be revealed prior to award.
3. Contract awarded on basis of offeror's good faith certification that it is small, which status is determined erroneous by SBA, is voidable and may be terminated for convenience in discretion of agency where, as here, it is determined contracting officer should have questioned size status prior to award.
4. Although determination to terminate contract for convenience of Government rests with agency concerned and not with GAO, it is noted that court has held that in absence of bad faith or clear abuse of discretion such termination is valid and no such showing is made here.

This decision involves a protest by Service Industries, Inc. (Service), against the award of contract No. GS-09B-0-1623 to Merchants Building Maintenance Company (Merchants) and a protest by Merchants against the subsequent termination of that contract, awarded pursuant to request for proposals (RFP) No. PBS-BMD-74-64(N), issued by the General Services Administration (GSA), Public Buildings Service, Buildings Management Division, for cleaning services at the Federal Building in Los Angeles.

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The solicitation, issued on April 3, 1974, was a total small business set-aside. Proposals were to be received, as amended, by 4:15 p.m. on May 6, 1974. Merchants' proposal, dated May 4, 1974, contained a certification that it was a small business concern. In its best and final offer dated January 11, 1975, Merchants again certified that it was a small business having an average of less than \$3 million in sales for the preceding 3 years.

Merchants, being the low offeror, was awarded the contract on February 19, 1975, with performance of the contract to begin on March 17, 1975, and to continue for 1 year, with two 1-year options. All unsuccessful offerors were notified by letter dated March 4, 1975, that the award had been made to Merchants.

On March 10, 1975, the contracting officer received a telephone call from Service informing her that Merchants was not a small business. On March 11, 1975, Service sent a telegraphic communication to the contracting officer, received on March 12, 1975, again questioning the size status of Merchants. On March 13, 1975, the protest was referred to the Small Business Administration (SBA). SBA responded on March 18, 1975, by stating that the protest was untimely. GSA further requested that SBA determine the size status of Merchants for use in future procurements. By letter dated March 20, 1975, GSA advised Service that the protest had been referred to SBA but that any decision by SBA would not disturb the award to Merchants since the protest was received after award. On March 19, 1975, Service protested the award to our Office. By letter dated March 27, 1975, SBA advised Merchants that it was not a small business when it submitted an offer on solicitations having a size standard of \$3 million in sales for 3 years. In addition, SBA concluded that while Merchants apparently was a small business at the time of submission of its proposal in May 1974, by the time of award in early 1975 it had become large by inclusion of its 1974 fiscal year sales in its total sales.

GSA subsequently advised Merchants that its contract, which contained options for two additional years of cleaning services, would not be extended beyond the initial 1-year period. This determination was based upon GSA's conclusion that information as to sales submitted with its offer should have caused the contracting officer to question the veracity of Merchants' self-certification and to refer the question of its size status to SBA pursuant to section 1-1.703-1(b) of the Federal Procurement Regulations (FPR) (1964 ed. amend. 106). By letter dated May 2, 1975, Merchants was informed that GSA contract No. GS-09B-0-1623 would be terminated for the convenience of the Government effective June 20, 1975.

Based upon the termination notice sent to Merchants by GSA, Service withdrew its protest by mailgram dated June 13, 1975, provided that the cancellation date of June 20 remained in effect. GSA by letter dated June 13, 1975, notified Merchants that the notice of termination had been modified to change the effective date to August 18, 1975. This superseded the May 2 notice of termination. By mailgram dated June 18, 1975, Service reinstated its protest after being informed by GSA of the termination date extension. On July 30, 1975, our Office received notification from GSA that it had made a determination to make an award prior to a final disposition of the protest by us. For reasons unknown an award was never made. By letter dated August 6, 1975, GSA again modified its earlier notice of termination and extended the termination date to October 17, 1975. Our Office was notified on October 14, 1975, that GSA is in the process of extending the termination date to March 16, 1976, while reserving the right to terminate the contract at any time after 30 days' notice to the contractor.

On June 6, 1975, in a letter to our Office, counsel for Merchants protested GSA's decision to terminate the contract. Counsel for Merchants contends that (1) our Office has jurisdiction to consider a protest against a termination for convenience of a contract; (2) the self-certification submitted by Merchants with its offer on May 6, 1974, indicates that it was a small business; (3) GSA has erroneously and in abuse of its discretion terminated Merchants' contract; and (4) the protest of Service is untimely and not for consideration by our Office. Counsel for Merchants asserts that although Merchants was determined to be a large business by the SBA, it was, in fact, a small business at the time it submitted its offer in May 1974 and properly so certified. Furthermore, it is alleged that had the contracting officer questioned Merchants' size status she would have confirmed the validity of its self-certification and small business status. Therefore, it is argued that there was no basis for termination of its contract.

With regard to counsel's contention that our Office has jurisdiction to review Merchants' protest against termination of its contract, it is generally recognized that "* * * the determination whether a contract should be terminated for the convenience of the Government is a matter of administrative decision which does not rest with our Office." 47 Comp. Gen. 1, 3 (1967); E. Walters & Company, Inc., Dynamit Nobel A G, Nico Pyrotechnik K G, B-180381, May 3, 1974, 74-1 CPD 226. Therefore, we do not believe it would

be appropriate for us to review the validity of the termination per se. However, it is appropriate for our Office to review the validity of the procedures leading to the award of the contract to Merchants.

Under FPR § 1-1.703-1 (1964 ed. amend. 106), a contracting officer is required to accept at face value for the particular procurement involved a certification by the bidder or offeror that it is a small business concern unless a written protest is received from another bidder concerning the size status of the apparently successful bidder or offeror or the contracting officer questions the small business status of the bidder or offeror and submits the question to the SBA for determination. Under § 1-1.703-2(b) (1964 ed. amend. 134) of the regulations a size protest by a bidder or offeror, in order to apply to the procurement in question, must be submitted to the contracting officer prior to the fifth day, exclusive of Saturdays, Sundays and legal holidays, after bid opening or closing date for receipt of proposals, except that in negotiated procurements the protest is timely if filed within 5 working days after notification of the identity of the offeror being protested. The contracting officer may at any time after bid or proposal opening question the small business status of any bidder or offeror for the purpose of a particular procurement by filing a written protest with the SBA district office in which the principal office of the protested concern is located. A protest by a contracting officer shall be timely for the purpose of the procurement in question whether filed before or after award. FPR § 1-1.703-2(b), supra.

Since this was a negotiated procurement and the identity of the offerors was unknown to each other until after award, it was a practical impossibility for any offeror to protest the size status of any other offeror prior to award. As previously indicated, all unsuccessful offerors were notified by letter dated March 4, 1975, that award had been made to Merchants. It appears from the record that Service received this notification on March 10 and its written protest was received by the agency on March 12. Therefore, it appears that its protest was timely and applicable to this procurement under the above regulation notwithstanding SBA's contrary conclusion.

Pursuant to 15 U.S.C. § 637(b)(6) (1970), the SBA is empowered to determine a business concern's size status for procurement purposes. Offices of the Government having procurement powers must accept as conclusive any determination reached by SBA as to which concerns are to be designated as small business. In discharge of this responsibility, SBA has promulgated regulations which have the

force and effect of law (Otis Steel Products Corporation v. United States, 161 Ct. Cl. 694 (1963)), found at part 121 of chapter I of the Code of Federal Regulations, title 13 (1974). Such size determinations are final unless appealed in the manner provided in section 121.3-6. Furthermore, FPR § 1-1.703-1(b), supra, provides that the controlling point in time for a determination of size status shall be the date of award. Since the SBA has determined that Merchants was a large business at the time of award, this is binding on GSA.

It has long been the position of our Office that a contract awarded on the basis of a bidder's good-faith certification that it is a small business concern, which status is subsequently determined to be erroneous, is not void ab initio but is voidable at the option of the Government. 49 Comp. Gen. 369, 375 (1969); 41 id. 252 (1961). When Merchants submitted its offer in May 1974, it also submitted its 1973 annual report which showed net sales for the fiscal years ending June 30, 1973, and June 30, 1972, were \$3,795,365 and \$2,595,426, respectively. Such information, according to GSA, should have caused the contracting officer to question the size status of Merchants prior to making an award in February 1975. In view thereof, and since Merchants was other than a small business concern at the time of award, GSA has determined that the contract should be terminated.

As noted previously, the determination whether a contract should be terminated for convenience is a matter of administrative discretion which does not rest with our Office. 47 Comp. Gen. 1, supra. In this connection, however, we note that the Court of Claims held in National Factors, Inc., and The Douglas Corporation v. United States, No. 93-63, March 20, 1974, that "The termination of a contract for the convenience of the government is valid only in the absence of bad faith or a clear abuse of discretion." See E. Walters and Company, Incorporated, B-180381, June 20, 1974, 74-1 CPD 337. We fail to see any showing of abuse of discretion or bad faith in connection with GSA's determination to terminate the contract.


Accordingly, there is no basis for our Office to question GSA's determination to terminate the contract.

However, we believe this case demonstrates a need for revision of § 1-1.703-2(b) of the FPR. As noted above, in a negotiated procurement the regulation provides that a size protest received within

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5 days after notification of the identity of the offeror being protested is timely. However, the subsequent determination by SBA that the protested offeror is other than small does not result in the awarded contract being void ab initio, but merely voidable at the option of the Government. Unlike formal advertising, there is no public opening of offers. Therefore, the identity of offerors is not revealed until after award and an effective size protest is precluded. To avoid this anomalous situation, Armed Services Procurement Regulation § 3-508.2(b) (1974 ed.) provides, with certain exceptions, that in negotiated procurements the contracting officer shall inform each unsuccessful offeror by written notice of the name of the successful offeror prior to award. By separate letter of this date we are bringing this matter to the attention of the Director of the Federal Procurement Regulations Division.

In addition, we believe there is a question as to whether this procurement was properly negotiated rather than formally advertised. Although GSA has cited 41 U.S.C. § 252(c)(10) (1970) as authority for negotiating, it would appear that the specifications were adequate for formal advertising. However, since this was not an issue raised or addressed by the parties to the protest, and since this question is actively under consideration in connection with another protest before our Office, it will not be decided herein.


Deputy Comptroller General
of the United States